United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1389

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

ERNEST MALIZIA,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendant-Appellant
401 Broadway
New York, N.Y. 10013
925-2105

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel. (212) 447-5358

CASES CITED

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PRELIMINARY STATEMENT

This brief is in reply to appellee's brief served by mail and received by appellant on June 12, 1974.

ARGUMENT

In Point 1A of appellee's brief, the government argues:

> While proof of an unsuccessful search for the informant might, as Malizia suggests, have enabled the Government to avoid an unfavorable charge to the jury, it would in no way have weakened defense arguments disparaging the sincerity of efforts to find the informant, suggesting that the informant's testimony would not have supported the Government's case, and urging that his absence alone raised a reasonable doubt as to the defendant's guilt (Tr. 519-521, 536).
>
> Because of the natural adverse inference which arises when a party fails to call a witness who might ordinarily be expected to give favorable testimony to his cause, judges are properly invested with

> broad discretion to permit such party to explain away the harmful inference. (Appellee's Brief p. 10)

This is not correct. In United States v. Super, 492 F2d 319, 321-23 (2d Cir. 1974) this court dealt with a similar situation. In Super, the government could not locate an informant who would have been an important witness at trial. Testimony was given as to the unavailability of this witness and as to attempts to find him. There is no indication of any testimony as to why the witness was missing or about his state of mind. The trial court, upon this showing, charged the jury that the Government was not required to produce the witness and that no inferences for or against the defendants should be drawn by reason of the Government's failure to call him. This court stated:

> At the outset of the trial, Judge Judd indicated that if Lombardi were equally unavailable to both sides, the jury should not draw an inference one way or the other. A determination that he was equally unavailable was a finding he could properly make here. See United States v. Bergman, 354 F. 2d 931, 935 (2d Cir. 1966); United States v. D'Angiolillo, supra, 340 F2d at 457. Under all the circumstances, we find no reason to question the fact that Lombardi was in fact missing, that he was not under Government control and that his whereabouts were unknown. Therefore, the charge of Judge Judd that no inference might be drawn by

the jury either for or against either party by virtue of Lombardi's absence was proper (Slip op. 1967-77)

It is clear, that here there was no necessity to go into the informant's state of mind. The appropriate procedure would have been for the government to request that a charge similar to that employed in Super be given.[1] On this record, such a request would have been well within Judge Motley's descretion to grant. Had she given such a charge it would have been proper and certainly upheld on appeal. The failure of the government to request the appropriate remedy can not be used to justify the use of an inappropriate one.

The cases cited by the appellee are not on point since they deal with the rehabilitation of witness testimony where the witness's state of mind is clearly necessary to explain the reason for prior inconsistent statements.[2]

The government's position (p. 13 appellee's brief) that this was, in any event, harmless error is

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1. The Assistant United States Attorney advised the Court of the fact that Gerstenfeld was unavailable to both sides (p. 15 Minutes of the Proceedings on February 13, 1974, at 10:00 A.M.).

2. The government's position that the fear expressed by Gerstenfeld "was directed to the informant's fear of testifying in any case in which he had been an informant." (P. 12 appellee's brief) is at odds with previous statements made by Mr. Littlefield: "... and if called to testify against the Malizia's he would lie because

[footnote continued]

incorrect.[3] The fact that nine agents testified is no more overwhelming proof of guilt than the alibi testimony of nine of appellant's associates would have been overwhelming proof of innocence. There was no documentary evidence in this case. It was a case based entirely on the credibility of the agents. Appellant raised a defense, which, if believed, refuted the agents. While this evidence warranted the case going to the jury it was not in any meaningful sense overwhelming.

In Point IC (p. 17 of appellee's brief), the government argues the admission of the testimony about Malizia's fingerprints was not plain error. Appellant would merely like to call the Court's attention to its decision in United States v. Rinaldi, 301

[footnote 2 continued]
he was afraid because he felt he would be killed'' (p. 15 Minutes of the Proceeding of February 13, 1974 at 10:00 A.M. Emphasis supplied). In any event, the record of what the jury heard on this issue does not support such speculation. Nor is it proper to assume the jury had any general knowledge of informant's fears, especially since many informants do testify.

3. As to the arguments raised in Point IA, B and C of appellee's brief and the effect of the alleged errors, appellant would ask the court to look at an article entitled ''The Trot Jury Explains Verdict,'' which appeared in the New York Post, June 3, 1974, at page 53 col. 3 under the by-line of Leonard Katz.

'' 'The Jury suspected he (Perry) was a member of the underworld and there was a suspicion of muscle,' said George Waters, 62, an unemployed steel buyer who lives in West Hempstead, L.I., and was juror No. 2.''

[footnote continued]

F2d 576, 578 (2d Cir. 1962) and United States v. Rivera, F2d (2d Cir., slip op. 2591, May 17, 1974). If, as appellant contends, this testimony was tantamount to informing the juror of prior criminality then it could not be rectified by curative instructions. This is a key issue in determining if the error, if error at all, was plain.

In Point II the government argues that Judge Motley did not order this jury to reach a verdict in this trial. The record clearly shows she did. Moreover, the government relies on Judge Motley's instructions that no juror "should surrender his honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered."[4]

[footnote 3 continued]
" 'Gerry and Perry went down the drain quickly,' Waters said." at col. 4.
In fact, the type of evidence of which appellant complains is most persuasive to jurors even if not so to attorneys.

4. It is interesting to note that in its brief, appellee substantially distorts Judge Motley's instruction. The above quote is what she said to the jury, in appellee's brief the language becomes:
"At the end of the charge she made very clear to the jury that no juror should surrender his honest conviction solely because he was outnumbered or for any other reason, and further that the verdict had to reflect the conscientious conviction of each juror (Tr. 594-595)." (At p. 22) (Emphasis supplied.)
The insertion of the words "or for any other reason" by appellee shows that he understands the true implications of the use of the word "solely" and the language which immediately follows it.

The language used by Judge Motley is confusing at best and does not negate her previous statement that the case had to be decided. Judge Motley's charge on this point is inaccurate and inadequate. The reasons set out by her for a juror to not surrender an honest conviction are incomplete. It permits a juror to surrender an honest conviction to reach a verdict.[5]

Moreover, the use of the word solely clearly implies that one who believed in innocence could still vote for conviction, as long as the reason for doing so was other than the opinions of the other jurors or being outnumbered. This charge directed that the juror reach a verdict and nothing said later corrected this.

Respectfully submitted,

Goldberger, Feldman and Breitbart
Attorneys for Appellant
401 Broadway
New York, N.Y. 10013
(212) 925-2105

J. JEFFREY WEISENFELD
On the Brief.

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5. Which is quite different from merely being outnumbered.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7th day of 14, 1974 at No. Foley Square deponent served the within Appellant's Reply Brief upon U.S. Attorney the Appellant Reply Brief herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Atty. Appellee therein.

Sworn to before me,
this 7th day of 14 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975